IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 806 of 1994

with

CRIMINAL APPEAL No 950 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT
and
MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SUNIL NATVAR NAYKA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 806 of 1994
MR BN RAVAL for Petitioner
MR BD DESAI, APP for Respondent No. 1

2. Criminal AppealNo 950 of 1994
MR BD DESAI for Petitioner
MR BN RAVAL for Respondent No. 1

CORAM : MR.JUSTICE H.R.SHELAT and
MR.JUSTICE J.R.VORA
Date of decision: 10/02/2000

COMMON ORAL JUDGEMENT : [Per: Shelat, J.]

1. Sunil Natvar Nayaka (original accused) was tried by the then learned Addl. Sessions Judge, Surat, in Session Case No.116 of 1993 relating to the offences punishable under Sections 363, 376 and 506 Part II of the Indian Penal Code. He came to be convicted on 29th July, 1994, of the offence punishable under Section 376 of the Indian Penal Code and sentenced to 7 years rigorous imprisonment and fine of Rs. 500/-, in default simple imprisonment for three months more; while came to be acquitted of the rest of the offences. Being aggrieved by such order of conviction both, the accused and State, have preferred these Appeals. The State in its appeal prays for enhancement of sentence inflicted.

2. Necessary facts may in brief be stated. Keshavbhai Dagduji Chowdhari, maintaining himself by plying rickshaw within the local limits of Surat city, is having one son and two daughters. Vaishali one of his two daughters was at the relevant time aged about 8 years. On 13th February, 1993, being Saturday, she was having the morning school. After the school hours, Vaishali had returned home around 12.00 p.m. Taking her meals, she had gone out to play along with her friends. Around 13.30 hours, Sunil Natvar Nayaka - the accused went there. By giving the pencil as well as confectionery, he allured Vaishali to go with him. He using force, took her to a nearby bungalow under construction, where he threw off his mask and violated the person of Vaishali. Vaishali, who had a pain around her private part, went to her house. As she was crying, her mother putting the question, tried to know what the matter was. She then narrated what betided her, and named the accused as wrong doer. After her father returned, a complaint was lodged with Umra Police Station for the aforesaid offences. At the conclusion of the investigation, a charge sheet against the accused was presented in the court of the Chief Judicial Magistrate, Surat. The learned Chief Judicial Magistrate was not competent to hear and decide the case. He therefore, committed the same to the Court of Sessions, which came to be registered as Session Case No. 116 of 1993. The learned Sessions Judge assigned the case to the then learned Addl. Sessions Judge, who framed the charge at

Exh. 3, to which the accused pleaded not guilty and came to be tried. The prosecution then led necessary evidence. Appreciating the evidence, the then learned Addl. Sessions Judge, Surat, found that the prosecution had beyond reasonable doubt succeeded in establishing the charge relating to the offence punishable under Section 376 of the Indian Penal Code. He, therefore, convicted the accused of the offence punishable under Section 376 of the Indian Penal Code and sentenced him as aforesaid while the accused came to be acquitted of the rest of the charges as the learned Judge found that the said charge was not proved. The accused has, therefore, preferred Criminal Appeal No. 806 of 1994, challenging the conviction and sentence while the State has preferred the Criminal Appeal No. 950 of 1994 for enhancement of the sentence. It may be stated that no appeal is filed challenging the order of acquittal.

3. In both the Appeals, common questions of law and fact are raised. To avoid duplication of work, waste of time and conflicting judgments, we preferred to hear both the Appeals together and dispose the same of by a common judgment. Accordingly, both the Appeals are heard and by this common judgment, both the Appeals shall stand disposed of.

4. Assailing the order of conviction, Mr.Raval, learned Advocate for the accused submits that on three to four grounds, the learned Addl. Sessions Judge has fallen into error. According to him, when the Doctor examined Vaishali, no marks of violence were found and the hymen was also found intact. The accused is fully grown up and developed person. If such accused tries to have the intercourse with a small girl aged about 8, injury on his private part would certainly be found, but in the present case, when Doctor has found no injury on the private part of the accused it is the circumstance on record going to discredit the truth of the prosecution's case.

5. When the rape is committed by a fully developed man on a minor virgin girl, injury to his organ would ordinarily be caused and noticed if within 20 to 24 hours doctor examines him and absence of injury may point to the innocence of the accused. But, there will be cases where injuries on the private part of the accused may not be caused and found if the penetration is not to the fullest extent, but it is slightest or marginal or infinitesimal. When the evidence of Vaishali is read along with the evidence of Dr.Vandana Patel (Exh.12), it becomes clear that Vaishali was crying when she was taken

to the Doctor and blood stains were found on her knickers. The Doctor has issued the certificate (Exh.13) which shows that labia minora was found red. The Doctor has, therefore, made it clear that the genital area of virgin was monkeyed with. A perusal of the evidence of Vaishali and her mother Sindhuben (Exh.11), who soon after Vaishali narrated how her person was violated, had gone to the appellant's house to scold, shows that there was no full penetration but it was slightest and because of that there was no injury on the private organ of the appellant. In view of such facts and circumstances, absence of any injury on the private part of the appellant would not point innocence as canvassed by the learned Advocate for the appellant. It may however be mentioned that injury on other part of the body of appellant points to his guilt.

6. After arresting the accused, when the panchnama of his physical condition was drawn (Exh.21), it was found that the skin near the stomach and near right and left elbows was peeled off. It would appear only when a man tries to commit rape by force at the place where the surface is rough. The accused in this case had taken Vaishali to the nearby bungalow, which was under construction and naturally at that time the surface must be rough. Such injuries and as discussed above when genital area of Vaishali was as found by the Doctor, monkeyed with, being the strongest evidence on record indicate the guilt of the accused.

7. Of course, hymen was found in fact and no other marks of rape could be seen when the doctor examined Vaishali, but that aspect cannot help the appellant. As discussed above, the genital area was found to have been monkeyed with and knicker was found stained with blood. Such minor injury or marks of violence can be seen if penetration is not full but lightest or too little. In the case of hand, penetration was too little to cause the injuries as canvassed. It is pertinent to note the conduct. Vaishali soon after going to her house was crying. Her mother could know putting questions that the appellant had violated her person. She then went to the house of appellant to chide him rudely. Such facts with certainly points the finger of guilty at appellant.

8. The learned Judge has elaborately discussed assigning logical reasons, the evidence and has reached the conclusions which are logically possible. We generally agree with him and, therefore, it is not necessary to re-state his reasonings and the findings. It may also be mentioned at this stage that in the memo

of Appeal, the accused has mentioned that he had at last pleaded guilty before the trial court. In view of such facts, we see no reason to interfere with the order of conviction.

9. With regards to the sentence, the State has preferred Appeal for the enhancement.It is the contention of Mr. Desai, learned APP that the learned Judge ought to have at least inflicted 10 years imprisonment in view of the provision of Section 376 of the Indian Penal Code. As per Section 376 (2)(f) of the Indian Penal Code, if the person commits rape on a woman under twelve years of age, he is to be punished on charge being proved sentencing him to rigorous imprisonment for a term which shall not be less than 10 years, but it may be for life, and shall also be liable to fine.

10. Mr. Desai, learned APP emphasises much on this provision and urges to suitably enhance the sentence. No doubt, as per the provision, the learned Judge has not inflicted the minimum sentence and it appears that he has resorted to the proviso to that provision which provides that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of description for a term less than 10 years. For that purpose, the accused has to explain and convince the court for lesser punishment. The learned Addl. Sessions Judge has no doubt assigned the reasons, but, we are not impressed with the reasons he has given. However, we do not find any just cause at present to enhance the punishment of sentence. The accused was present before us on 8.2.2000 and he submitted his affidavit narrating the circumstances to show mercy. According to him now the enhancement of sentence would not be just and proper and would serve no purpose. On the contrary it would harm his future. He has stated that he has undergone the sentence inflicted and after undergoing the sentence of 7 years, he has been released from the jail. During the custody in jail, his conduct was quite good. He did not enjoy parole or furlough leave. At present her father and mother are aged. His mother has lost one eye, and the vision of the second eye is very poor because of cataract. She requires constant assistance,and his father being aged is not in a position to take care of his mother. His father is doing nothing and for the maintenance of his family, he is the only bread earning person after he is discharged from jail. At present, he is serving in one factory where he is earning Rs.40/- per day. He is now maintaining his

family and has set every thing to order and track. He is firmly and slowly settling down and does nothing illegal. If again he is sent back to jail enhancing the sentence, the family set up would be disrupted. Everything would be shattered and battered giving rise to several problems, difficulties and hardships. His parents will be helpless and their plight will know no bounds. It is also stated in the affidavit that if he is sent again to the jail, it will be very difficult for him to get the employment again and maintain himself as well as his family members. He and his family members will have to starve and face miseries and woes. Looking to in such circumstances and with a view to see that the set up for the well-being of the the family is not upset, we see no reason to enhance the sentence. The enchancement would be a curse and not the reformative or adequate remedial measure.

11. For the aforesaid reasons, we see no justifiable reasons to allow either of the Appeals. Both the appeals merit dismissal and are hereby accordingly dismissed.

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